

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**





77-1018

In The  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

\_\_\_\_\_  
No. 77-1018  
\_\_\_\_\_

THE UNITED STATES OF AMERICA,  
Appellee,

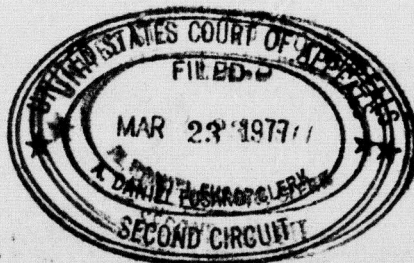
vs

MICHAEL PATRICK BARRETT,  
FERDINAND SANTANA,

Defendants-Appellants.

\_\_\_\_\_  
BRIEF FOR DEFENDANT-APPELLANT BARRETT  
\_\_\_\_\_

Appeal from the Judgment of Conviction  
of the United States District Court for  
the Western District of New York at  
Indictment No. CR. 1976-95  
\_\_\_\_\_



RICHARD BROWNSTEIN  
Attorney for Defendant-Appellant  
Michael Barrett  
Office and P.O. Address  
427 Brisbane Building  
Buffalo, New York 14203  
Telephone: (716) 856-5677

## INDEX

	Page
STATEMENT OF THE CASE.....	1
QUESTIONS PRESENTED ON APPEAL.....	3
STATEMENT OF FACTS.....	4
POINT I.      The Court committed reversible error by its refusal to declare a mistrial because of the illegitimate prejudice engendered by an article appearing October 29, 1976, in the Buffalo Courier-Express.....	7
POINT II.     The supplemental instructions, some of which were unsolicited by the jurors, emphasizing once again to the jurors that circumstantial evidence was enough to convict, was in these circumstances so prejudicial to the defendant as to warrant a mistrial.....	9
POINT III.    The conviction returned by the jurors against the defendant on the second count of the indictment is against the weight of the evidence and should be reversed.....	11
CONCLUSION    The conviction should be reversed.....	12

## TABLE OF CASES

Viereck v. United States, 130 F. 2d 945.....	8
--	---

- A. Denotes page number in Appendix  
R. Denotes page number in Record on Appeal



UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

---

THE UNITED STATES OF AMERICA,  
Appellee,

VS

MICHAEL PATRICK BARRETT,  
FERDINAND SANTANA,  
Defendants-Appellants.

---

BRIEF FOR DEFENDANT-APPELLANT BARRETT

STATEMENT OF THE CASE

The defendant Michael Patrick Barrett and two others were jointly indicted on June 24, 1976, accused in a three-count indictment of robbing a Chase Manhattan Branch located in a small plaza, Colvin-Eggert, in the Town of Tonawanda, New York. The defendants were tried jointly.

The defendant Barrett was convicted on the second count of the indictment, a violation of §2113(b), the theft of some \$9,900.00. The jurors disagreed about the innocence or guilt of the defendant Barrett pertinent to the first and third counts.

A co-defendant Joseph Charles Ferraro was similarly convicted. The defendant Ferdinand Santana was convicted on each of three counts included in the indictment, which accused him of a violation of §2113 (a) (b) (d) of the United States Code.

No pretrial motions were made on behalf of the defendant Barrett.

During the trial proper there appeared a half-page article published in the Buffalo Courier-Express disclosing interviews had by the newspaper reporter in question with Richard J. Arcara,

United States Attorney for the Western District, and Mr. Gibbs, a member of the Federal Bureau of Investigation. (Exhibit 1; A-9)

Counsel moved for a mistrial predicated upon the adverse illegitimate effect the article could have upon the jurors, stressing to the Court that the interviews granted by the United States Attorney and the F.B.I. Agent were granted voluntarily with the full knowledge that the article would have a devastating impact upon an on-going trial. That the factual circumstances reported in the newspaper article made the basis for a motion for mistrial, were in many instances identical with the facts brought out by the United States Attorney on trial. That motion was denied. (R-1018-1035; 1050-1056) (A-11).

The Court denied motions to dismiss the indictment against the defendant Barrett made to it at the close of the Government's case and at the conclusion of all of the testimony.



QUESTIONS PRESENTED ON APPEAL

1. Did the Court commit reversible error by its refusal to declare a mistrial because of the circumstances surrounding the appearance of a newspaper article contained in the October 29, 1976, issue of the Buffalo Courier-Express?

2. Did the supplemental instructions, some of which were made gratuitously by the Court, operate to deprive the defendant of a fair trial, particularly where:

- a. a note to the jurors made known that the jurors stood eleven to one for conviction, and
- b. That the juror holding out was doing so because he would not accept circumstantial evidence as sufficient?

3. Is the conviction of the appellant on the second count of the indictment against the weight of the evidence?

### STATEMENT OF FACTS

The Colvin-Eggert branch of the Chase Manhattan Bank was held up a few minutes before noon June 16, 1976.

Three armed men all wearing hoods burst through the entranceway, two of them vaulted the teller's counter, forced each of two tellers to surrender all of the proceeds on hand in the various drawers. Additionally, they scooped up three canvas bags which had been prepared earlier for a retail food outlet, Super Duper. The canvas bags contained \$500.00 in singles, \$400.00 in quarters, \$100.00 in dimes, \$60.00 in nickels and \$20.00 in pennies. The total take was \$9,911.00.

It would appear from the trial testimony that one or more of the robbers escaped in a white and blue Cadillac, license number EC-881. (R-347) (A-8) . The assistant manager succeeded in glimpsing this license number as the car sped away.

The police were on the scene within moments, since one of the bank personnel had activated the burglar alarm as the bandits were rushing from the bank. The getaway car license was given to the police; an alert was flashed over police bands.

Several witnesses had seen the three men fleeing from the bank. One witness in particular claimed that he had noticed one of the thieves carrying what appeared to be a pillowcase.

Another individual waiting for his automobile in a garage, located close to the bank, was able to see the robbery in progress. There was no on-the-scene eyewitness identification.

Between 11 and 11:30 of that particular morning one Carlton Gilmour, retired, living at 31 Joseph Drive, part of a four-building



apartment complex, happened to be looking out the window. He saw a car pull into Joseph Drive and back into the area before his front window. The driver blew the horn several times. Immediately thereafter he saw a man run toward the vehicle and enter it. Between five and eight minutes elapsed before three men jumped out of the car, one running around the south side of the apartment building Gilmour lived in, the other two ran around the north side. Mr. Gilmour took the precaution of jotting down the license number of the vehicle, which was 455-EDQ. The car was a dark green LeMans.

Within minutes of the alert the car was discovered in a parking space behind an apartment in the Joseph Drive apartment complex.

The tenant Carlton Gilmour gave the police the license number of the LeMans, simultaneously explaining to them that he had jotted the number down because he was suspicious of the occupants. The police quickly determined that the LeMans belonged to a Miss Cheryl May, 886 Richmond Avenue, Buffalo. Numerous officers from the Town of Tonawanda Police Department, the Buffalo Police Department and the Federal Bureau of Investigation arrived at the Richmond Avenue location within a very short time.

The LeMans was parked in the parking area behind the apartment building housing the four-apartment complex from 882 to 888 Richmond Avenue, inclusive.

A delay of some 45 minutes occurred between the arrival of the police at Richmond Avenue and forcible entry into 886 Richmond.

The defendant-appellant Barrett was found by the police in premises at 886 Richmond Avenue. The LeMans was impounded and examined for fingerprints. No fingerprints from the defendant Barrett were discovered anyplace in either the interior or exterior of the car. Nor did any of the hair samples taken from the appellant Barrett match hair samples found in either the ski masks or any articles of clothing allegedly used in the commission of the crime.



POINT I

THE COURT COMMITTED REVERSIBLE ERROR  
BY ITS REFUSAL TO DECLARE A MISTRIAL  
BECAUSE OF THE ILLEGITIMATE PREJUDICE  
ENGENDERED BY AN ARTICLE APPEARING  
OCTOBER 29, 1976, IN THE BUFFALO  
COURIER-ESPRESS.

The factual situation depicted by the explanations offered to the Court by Richard Arcara, United States Attorney, and Federal Agent Gibbs, demonstrates convincingly a concerted action between the prosecution and the press. It is not reasonable to make those assumptions which each of these gentlemen claimed were made, that is, that the article would not appear during trial of this defendant. It is even less credible to assume that neither of these two individuals would have the curiosity to inquire of the author of the article what his plans were with reference to a publication date. Hopefully, the Federal Bureau of Investigation, at least, trains its personnel in a more effective fashion.

The article was in fact a dissertation that the Government was plagued with bank robberies in the suburbs, noted similarities in nine unsolved suburban bank robberies, "they take over the banks...vault the counter...always pick banks near thruway entrances ...they switch cars a short distance from the bank...use plastic garbage bags...always use long-barreled hand guns...they wear ski masks." Each similarity referred to was exactly the same as the proof at trial against these defendants. In addition, the article went on to say that over \$150,000 has been stolen by this ring of eight members, and that "we have nearly a 100 per cent conviction

rate in bank holdups".

The prejudicial effect of this article is self evident. The Court merely questioned the jurors and one or two jurors admitted reading the newspaper but said they had not read the article; this in spite of the fact that two of these newspapers were found in the jury deliberation room the day the article appeared! It is naive to accept the jurors' statements as being forthright. They had been admonished daily not to read any articles in the newspapers and were undoubtedly afraid to admit they had.

Neither the United States Attorney or the F.B.I. should have permitted their respected offices to participate in discussions of unsolved bank robberies during the pendency of a bank robbery trial. The inevitable impact of this article, complete with photographs, was to associate these defendants with other bank robberies, stressing that the photographs showed the bandits wearing clothing similar to that allegedly worn by those men who had robbed the Chase Manhattan Bank on June 16, 1976.

Where there is a showing that adverse publicity is a direct result of concerted action between the prosecutor and agents of the press, this amounts to misconduct depriving a defendant of a fair trial.

Viereck v. United States, 130 F. 2d 945, at page 962.



## POINT II

THE SUPPLEMENTAL INSTRUCTIONS, SOME OF WHICH WERE UNSOLICITED BY THE JURORS, EMPHASIZING ONCE AGAIN TO THE JURORS THAT CIRCUMSTANTIAL EVIDENCE WAS ENOUGH TO CONVICT, WAS IN THESE CIRCUMSTANCES SO PREJUDICIAL TO THE DEFENDANT AS TO WARRANT A MISTRIAL.

During deliberations (A-35) the jury asked the Court whether it could change a determination arrived at against one of the defendants. The Court indicated that this could be done anytime before a jury verdict was made public.

Although the jurors made no request of the Court for a definition of circumstantial evidence, the Court went on to emphasize that circumstantial evidence is good evidence.

From the content of the note to the Court, it was obvious that the jurors stood eleven to one for conviction. In the note the jurors indicated a belief that he (the juror) would not convict because he would not accept circumstantial evidence.

In the light of the information disclosed in the note, the Court should have restricted its advice to that sought by the jurors. The continued admonition by the Court that circumstantial evidence is good evidence may have triggered the dissenting juror to fall into line without any real belief that the factual situation depicted from the testimony to convict a defendant or defendants.

The Court diverted the jurors from their earlier determination to remove from the docket the determination which had been arrived at against one defendant, and to presumably declare them-

selves unable to agree.

The situation was unique because it is seldom that a Court is aware, as the Court was in this instance, that the jurors stood eleven to one for conviction.

The prejudicial effect of the Court's behavior in urging the juror to accept the circumstantial evidence as sufficient is so serious as to require reversal of the conviction.



POINT III

THE CONVICTION RETURNED BY THE JURORS  
AGAINST THIS DEFENDANT ON THE SECOND  
COUNT OF THE INDICTMENT IS AGAINST  
THE WEIGHT OF THE EVIDENCE AND SHOULD  
BE REVERSED.

The testimony from the witnesses present in the bank at the time it was held up is uniform to the effect that none of the robbers was recognizable.

Each of the bandits wore ski masks and otherwise were dressed in garish costumes. There is no testimony that this appellant was in either of the cars used by the bandits in making their escape.

It is significant that hair found in the ski masks recovered on Richmond Avenue within a hour of the robbery was similar in appearance and structure to the hair samples taken from each of the co-defendants; but there was no hair found in any of the masks recovered which was similar in such appearance and structure to that of the defendant-appellant Barrett.

There was testimony that the co-defendant Santana's fingerprints were present on the exterior portion of the Pontiac found behind the Richmond Avenue addresses shortly after the bank was held up. There were no fingerprints discovered belonging to Barrett.

The factual situation, as it pertains to Barrett discloses only his presence in the Richmond Avenue premises.

That the jurors were troubled by the lack of connection between the premises robbed and this particular defendant-appellant,

is manifest from at is obviously some sort of compromise verdict arrived at, pertaining to Barrett. Although all of the factual elements alleged in the second count, for which a conviction was returned, are present in the first count of the indictment, the jurors disagreed as to Barrett's culpability on the first count.

CONCLUSION

The conviction should be reversed.

Dated: March 17, 1977

Respectfully submitted,

RICHARD BROWNSTEIN  
Attorney for defendant-appellant  
Michael Patrick Barrett  
427 Brisbane Building  
Buffalo, New York 14203



UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

---

THE UNITED STATES OF AMERICA

Appellee

vs

Affidavit

MICHAEL PATRICK BARRETT,  
FERDINAND SANTANA

No. 77-1018

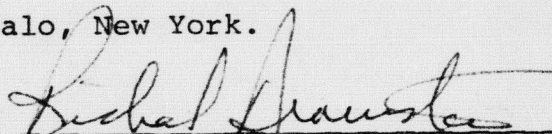
Defendants-Appellants

---

STATE OF NEW YORK)  
COUNTY OF ERIE     ) SS:  
CITY OF BUFFALO    )

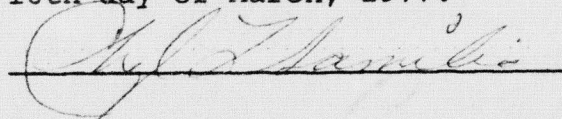
RICHARD BROWNSTEIN, being duly sworn, deposes and says:

That on the 18th day of March, 1977, he personally served three copies of Brief for Defendant-Appellant Barrett and Appendix for Defendant-Appellant Barrett on the United States Attorney, United States Courthouse, Buffalo, New York.

  
Richard Brownstein

Sworn to before me this

16th day of March, 1977.



CHIEF CLERK  
U.S. COURT OF APPEALS  
FOR THE SECOND CIRCUIT  
Buffalo, New York  
16th day of March 1977